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No. 91-781

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

A PARCEL OF LAND, BUILDING, APPURTENANCES AND IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE, RUMSON, NEW JERSEY, AND BETH ANN GOODWIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a person who receives proceeds allegedly derived from drug trafficking and uses those proceeds to purchase a home is entitled to assert an "innocent owner" defense in an action seeking civil forfeiture of the home.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 937 F.2d 98. The opinions of the district court denying respondent Goodwin's motion for dismissal and for summary judgment (Pet. App. 17a-35a) and certifying certain questions for interlocutory appeal (Pet. App. 38a-45a) are reported, respectively at 738 F. Supp. 854 and 742 F. Supp. 189.

JURISDICTION AND STATUTORY PROVISIONS INVOLVED

The Respondent accepts the statement of jurisdiction and recitation of the statutory provisions involved as set forth in the Brief of the United States. In addition, the Fourth Amendment and the Fifth Amendment to the Constitution, which prohibit unreasonable seizures and the deprivation of property without due process, are involved.

STATEMENT

Respondent Beth Ann Goodwin lived with Joseph Brenna in a relationship akin to marriage from early 1981 to late 1987. Brenna supported Ms. Goodwin and her children from the beginning of that relationship. JA 31-33. In late 1982, Brenna instructed Shaun Murphy, an accountant who managed investments for Brenna and other clients, to liquidate a certificate of deposit and transfer approximately $216,000 to Goodwin's attorney in New Jersey. JA 14; 44-46. Ms. Goodwin used that money to pay the balance of the $240,000 purchase price for a home at 92 Buena Vista Avenue, Rumson, New Jersey in November 1982. Ms. Goodwin severed her relationship with Brenna in late 1982 and barred him from the property. JA 32. Ms. Goodwin held title to the house; she resided there and treated it as her own, paying for all taxes, maintenance and improvements. She has willed the property to her children. JA 32. She provided a sworn assertion that she had no knowledge that the money used to purchase the house was drug-related and that she gave no consent to any drug transactions on or involving the property. JA 32.

In April of 1989, the United States seized Ms. Goodwin's home where she was residing with her infant and two adolescent children. Mr. Brenna never had any legal, equitable, or ownership interest in the property and had none at the time of the seizure. JA 32.

No pre- or post-seizure evidentiary hearing was ever held. Ms. Goodwin filed a motion to dismiss the seizure action and for summary judgment in September 1989. The district court held that there was probable cause to believe the property was purchased with the proceeds of a drug transaction and, therefore, that Ms. Goodwin could not, as a matter of law, maintain an innocent owner claim to the property.[1] After concurring in the finding of

[1] No cognizable evidence that controverted Ms. Goodwin's innocence was ever submitted. In May 1988, in connection with the criminal investigation of Mr. Brenna, the government compelled Ms. Goodwin to provide testimony while promising that her testimony would not be used against her. Ms. Goodwin's immunized testimony was nonetheless used to prepare the forfeiture complaint. Pet. App. 10-11, 29-30. Her testimony revealed that she believed Brenna owned a boat business which supplied the income that he used to support her. She admitted that the funds for her support, the down payment for the home, and the used car purchased for her were provided by Brenna. She acknowledged that she did not have independent income and did not file tax returns for that time period. Such testimony cannot be used against her. *Braswell v. United States*, 487 U.S. 99, 119 (1988). Goodwin's immunized testimony verifies her innocence and lack of knowledge concerning the $216,000, both at the time of the alleged criminal transaction and on the date the house was purchased. The United States did not plead in the complaint, concededly drafted by use of her immunized testimony, that the claimant was *not* innocent and submitted no cognizable

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probable cause,[2] the Third Circuit reversed the district court, holding that an owner of a home, who was innocent of involvement in the drug trade and did not know that funds used to purchase or maintain a property may have come from drug proceeds, had a defense to that forfeiture action. (Pet. App. 6a-9a.)

SUMMARY OF ARGUMENT

The government asks that the Court apply the relation back doctrine to extinguish the ownership rights of an innocent homeowner even though neither the homeowner nor the property participated in the offense warranting forfeiture. This Court has never sanctioned an *in rem* forfeiture on the theory that "proceeds" traceable to

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evidence of her knowledge that the funds were traceable to drug proceeds. The Drug Enforcement Agency ("DEA") representative who attested to and drafted the Complaint, Agent Giacobbe, simply asserted at his deposition that she must have known, since she lived with Brenna. *See infra* at pp. 24-26.

[2] Both the district court and the Third Circuit relied on the filing of the Brenna indictment in April 1990, a full year after Ms. Goodwin's home was seized, to find probable cause. Review of that indictment reveals no allegations of any specific drug transaction prior to 1985. JA 34-40. No consideration was apparently given by the Court below to the fact that Goodwin's immunized testimony had been gathered in part to underpin the indictment against Brenna. To the extent the indictment provided the probable cause to seize her home, her immunized testimony was improperly used to deprive her of her home.

an offense came into the hands of an innocent third party long after any alleged offense and were used by that third party to purchase property which property thereby becomes forfeit.

Due process and the prohibition against unreasonable seizures should prohibit the forfeiture when both the homeowner and the property are not substantially connected to the offense. The remission and mitigation provisions of the Code of Federal Regulations provide no remedy of constitutional significance since they invest the claimant with no enforceable rights.

The innocent owner provision of Section 881, if construed broadly to protect all innocent owners, would make this statutory scheme constitutional. Anything less will not. The legislative history and the plain meaning of the statutory language both strongly suggest that a broad construction of Section 881 is appropriate.

ARGUMENT

AS LONG AS DRUG FORFEITURE LAWS ARE USED TO FORFEIT DRUG "PROCEEDS" IN THE HANDS OF THIRD PARTIES, THE "INNOCENT OWNER" DEFENSE MUST BE GIVEN A BROAD CONSTRUCTION.

Forfeiture by the sovereign is a concept that has its roots in English common law and it continued in our federal case law immediately after the adoption of the Constitution. Forfeiture actions fall into two distinct categories: *In rem* forfeiture of an inanimate object where the object is seized and is treated as the defendant on the

theory that the object itself is the wrongdoer. Contraband and objects used in the commission of an offense are forfeit as a result of the property's participation in the crime. Forfeiture based on *in personam* jurisdiction over a felon is intended to deprive the criminal of all of the proceeds of his criminal actions. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-83 (1974); *see generally, Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 628 n.5 (1989) (Blackmun, J., dissenting); *Waterloo Distilling Corp. v. United States*, 282 U.S. 577, 581 (1931).

This is an *in rem* action. The government therefore contends that the owner's innocence (and indeed, the owner's identity) is irrelevant. (Br. at 14) Rather, the property is forfeit since the money that funded its purchase was allegedly traceable to a drug transaction. Unlike most *in rem* actions, this case is not based on the theory that the home was involved in the drug trade but rather, on the theory that it was purchased with proceeds for which there was probable cause to believe were traceable to a drug transaction.

During the last few years, as an aid to federal law enforcement efforts, certain statutes have been enacted permitting the forfeiture of "proceeds" of illegal activity. The forfeiture statutes in existence prior to the enactment of the Racketeering Statute, 18 U.S.C. 1963 *et seq.* ("RICO"), in 1970 did not provide for the seizure of "proceeds". Recently, many federal criminal statutes have been enacted for the forfeiture of proceeds. *See, e.g.*, 18 U.S.C. 981; 18 U.S.C. 2253 and 2254; 18 U.S.C. 1467; 21 U.S.C. 853 and 881. The jurisdiction for such actions should be *in personam* jurisdiction over the individual

defendant where all proceeds of an offense in whatever form could be forfeit.

In this case and in certain other recent cases, the government has purported to exercise *in rem* jurisdiction pursuant to Section 881 to attach downstream "proceeds" of illegal activity. No Supreme Court case has approved such efforts. Earlier Supreme Court cases wrestled with the concept that a piece of property involved in a crime was tainted and irrevocably forfeit as of the date of that crime. A subsequent transfer to a bona fide purchaser of that guilty property was irrelevant. The guilty property was forfeit. The proceeds were not. As Justice Marshall stated in *United States v. Grundy and Thornburgh*, 7 U.S. (3 Cranch) 337 (1806):

> To decide finally on the propriety of supporting the claim of the United States, as made in this action, under that branch of the statute which forfeits the vessel, another question still remains to be investigated. Has the doctrine of relation such an influence upon this case that an election subsequent to the sale shall carry back the title of the United States to the commission of the act of forfeiture, so as by this fiction of law to make them the real owners of the vessel at the time of sale, and consequently of the money for which she was sold?
>
> Without a critical examination of the doctrine of relation, it would seem to be a necessary part of that doctrine, that the title to a thing which is to relate back to some former time, must exist against the thing itself, not against some other thing which the claimant may wish to consider as its substitute. To carry back the title to the Anthony Mangin to the act of forfeiture, the title

> to the Anthony Mangin must have an actual existence. If no such title exists, then the right to elect the vessel is lost, and the statute has not forfeited the money for which she was sold in lieu of her. Suppose, instead of being sold by the defendants, she had been exchanged by Aquila Brown himself for another ship, would that other ship have been forfeitable, by the doctrine of relation, in lieu of the Anthony Mangin? Clearly not; for the statute gives no such forfeiture. The forfeiture attaches to the thing itself, not to any article for which the thing may be exchanged.

7 U.S. at 354.

But this is not such a case. Rather, the government claims, this real property became tainted by virtue of its purchase with funds traced to a certificate of deposit, which certificate of deposit was allegedly traceable to funds allegedly involved in a drug transaction. The government's use of forfeiture statutes to seize proceeds of drug transactions in the hands of innocent third parties is thus a recent development and is based upon statutes not previously construed by this Court. In *United States v. Grundy and Thornburgh, supra,* Justice Marshall made clear that "the forfeiture attaches to the thing itself, not to any article for which the thing may be exchanged." 7 U.S. at 354. An action for the proceeds could only be maintained against the person. 7 U.S. at 355.

In *United States v. Farrell,* 606 F.2d 1341 (D.C. Cir. 1979), the Court was asked to forfeit the funds paid for heroin. The drugs forfeiture statute in effect at the time did not specify that "proceeds" could be forfeited. The Court held that while the drugs were forfeit, the money

used to pay for drugs, *i.e.*, "derivative contraband," was not forfeit. 606 F.2d at 1344-46.

As the government perceives it, contraband flowing through the stream of commerce taints all funds or things of value for which it is exchanged, and those proceeds in turn taint and forfeit every subsequent article to which they are traceable. Consider the following theoretical scenario: In 1987, Goodwin mortgages the home in order to borrow $5,000. She uses the funds to purchase a used car. In 1990, she sells the car to the U.S. Attorney for the District of New Jersey for $2,500, and she uses the $2,500 to purchase a new computer from a local retailer. The government's construction of Section 881 would allow it to forfeit: (1) the house, currently mortgaged to a bank; (2) the car, currently owned by the U.S. Attorney; (3) the computer, currently owned by Ms. Goodwin; and (4) the $2,500 in the possession of the computer retailer.

This problem of following proceeds through the chain of title is not so implausible. Could the United States forfeit the $216,000 from the person who sold the house to Ms. Goodwin? The government recognizes the weakness of its construction when it states "this case concerns only the recipient of a gift of drug proceeds although normally a transaction will generate derivative proceeds that is property back to the drug dealer". Br. at 36, n. 13. The true meaning of the term "proceeds" in Section 881(a)(6) is property in the hands of the drug dealer. "Proceeds" thereby has a meaning in furtherance of Congress' effort to deprive a drug dealer of his profits. An *in personam* action would seem to be the appropriate means to strip a defendant of any further "proceeds" of his offense. The theory that property later transferred to

an innocent person by a drug dealer is tainted because it was once possessed by a drug dealer, and that it will proceed to infect other property, is foreign to this Court's construction of the forfeiture law over the last 200 years.

None of the historical precedents cited in the government's brief stands for such a proposition. Each of the Supreme Court cases construing the relation back doctrine in *in rem* cases concerns property over which the Court had jurisdiction because that property had been directly involved in the violation of federal criminal laws and was forfeitable as a result of its participation in the crime. None of those *in rem* cases involves property that became tainted after the illegal acts by virtue of being purchased by an innocent third party with proceeds traceable to an earlier illegal transaction.

The application of the relation-back doctrine makes little sense when applied to "proceeds" such as the property herein. The property was in the hands of strangers to the events at the time of the alleged illegal acts by Brenna in 1981 or 1982. Applied literally, Section 881(h) would divest the title from the people who sold 92 Buena Vista Avenue to Ms. Goodwin long before she ever met them. Yet even under the government's theory, the property did not become tainted until it was purchased with alleged proceeds, which was long after the illegal event giving rise to the forfeiture.

The concept of applying the relation back doctrine to "proceeds" traceable to a drug transaction is novel. Proceeds should mean only the funds used to purchase the drugs in the hands of the criminal defendant. *See United States v. Farrell, supra*. Congress was concerned with

defendants who turned drug money into jewelry, real estate or other valuables in order to further facilitate the drug trade. When a drug dealer sells a piece of real estate that he had purchased with drug money, he will receive proceeds in return. Those proceeds will then be forfeitable in an action against him personally (either criminal or civil). Is the money he expends as it flows downstream into the hands of innocents also forfeit? Does the government contend that it can forfeit both the property as it flows downstream and the derivative proceeds to the drug dealer as well? Does due process permit such double or triple forfeitures of the property of innocent owners? If the government's expansive theory is adopted, there will eventually come a time when virtually all assets will be tainted in whole or in part. Congress intended to punish the drug dealer, and protect the general public. Permitting the forfeiture of all downstream proceeds will serve to punish not the drug dealer, but the public that Congress intended to protect.

The phraseology in 21 U.S.C. 881(a)(6) of "all proceeds traceable to such an exchange" should mean the proceeds in the hands of the criminal defendant or in the hands of individuals with knowledge of the proceeds' tainted origin. To construe that phraseology to mean the items that are transferred from such a drug dealer to others and to then follow those transfers downstream creates *in rem* jurisdiction over property that is not guilty of participating in the offense.

The government's "taint" will apply to a host of other assets as they flow in the stream of commerce. After Goodwin and Brenna separated in late 1987, she did

indeed take a mortgage on her house, utilizing that mortgage for, among other things, living expenses, food, etc. Assume she had also used a portion of that mortgage to set her oldest child up in business. According to the government's present theories, they would have every right to seize the house, the oldest child's business and the food and necessaries purchased with the mortgage proceeds. If the oldest child's business had been successful, would the government have a right to seize the entire business that had prospered due to the child's efforts and would its claim be superior to creditors who were secured by financing agreements, revolving credit agreements and UCC filings?

Are all such items and security interests equally voidable? The construction sought by the government goes far beyond anything Congress contemplated and far beyond anything this Court has indicated is constitutionally permissible.

THE DUE PROCESS CLAUSE PROHIBITS THE CONSTRUCTION OF 21 U.S.C. 881(a)(6) URGED BY THE GOVERNMENT.

In this case, there has been no evidence and no finding that the property had any substantial connection to the drug trade, apart from its purchase with alleged proceeds.[3] The government argues that the Third

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[3] There is an allegation in the complaint that in December 1986 Brenna transferred money to a person as a reward for

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Circuit's decision to protect an innocent owner from the forfeiture of her home undercuts its efforts to eradicate illegal drug trafficking. .Br. at 42-43. The legislative history to other portions of these same drug forfeiture statutes reveals that Congress intended to impose punishments even more severe than traditional criminal punishment on drug violators by virtue of these forfeiture statutes:

> Today, few in Congress or the law enforcement community fail to recognize that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs which, with its inevitable attendant violence, is plaguing the country. Clearly, if law enforcement efforts to combat . . . drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made.

S. Rep. No. 98-225, 98th Cong., 2d Sess. 1991, reprinted in 1984 U.S. Code Cong. & Admin. News 3374.

(Continued from previous page)

participating in a marijuana importation and that that transfer of money took place on the premises. JA 15. The basis of that allegation was an unsworn hearsay statement made by an unreliable informant to a government agent. No evidence, hearsay or otherwise, was ever provided that suggested that Ms. Goodwin participated in, consented to or even knew of such a transaction. There is no claim or evidence that any drugs were ever on the premises nor was any finding made by either court below that there was probable cause to find that the property was used to facilitate the drug trade.

The forfeiture of a citizen's home is essentially criminal in nature. Innocent persons defending against such actions are entitled to the same protections to which criminal defendants are entitled. They should not be deprived of their homes on the basis of a showing of probable cause alone.

This court has held that the Fifth Amendment privilege against self-incrimination is applicable to all forfeiture proceedings whether in the context of a criminal prosecution or in an action denominated civil but which imposes penalties such as forfeiture, which are of criminal proportions. In *Boyd v. United States*, 116 U.S. 616, 633-34 (1886), this Court held:

> We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. . . . The information, though technically a civil proceeding, is in substance and effect a criminal one . . . As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself.

This Court has followed an "abstract approach" to determine which constitutional protections offered by the Bill of Rights apply to such quasi-criminal proceedings. Each penalty statute is individually analyzed for this

determination. *See United States v. Halper*, 490 U.S. 435 (1989); *United States v. Ward*, 448 U.S. 242, 248-52 (1980).

While this Court has not specifically been called upon to apply the constitutional protections of the Fourth and Fifth Amendments to forfeitures pursuant to 21 U.S.C. 881, it has recognized their applicability to other forfeiture statutes. *United States v. U.S. Coin and Currency*, 401 U.S. 715, 719 (1971); *United States v. $8,850 in U.S. Currency*, 461 U.S. 555 (1983); *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693, 700 (1965) ("a forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against law"). *See also United States v. Riverbend Farms Inc.*, 847 F.2d 553, 558 (9th Cir. 1988), where the Ninth Circuit concluded that the constitutional protections under the Fourth and Fifth Amendments were applicable to forfeitures under the Lemon-Marketing Act.

In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), this Court upheld a statute modeled upon 21 U.S.C. 881 (but apparently without an innocent owner exception) in the face of a due process challenge. This case materially differs, however, in that the government seeks to apply the forfeiture statute to downstream proceeds which were not involved in the illegal activity and where the owner was not privy to the illegal activity. In words pertinent here, the Court stated:

> It would be difficult to reject the constitutional claim of an owner . . . who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the

> proscribed use of his property; for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

Id. at 689-690 (citations and footnotes omitted).

In *Calero-Toledo*, this Court did not address the impact of the Fourth Amendment on the drug forfeiture proceeding. 416 U.S. at 679 n. 14. We ask this Court to address that question now. A forfeiture proceeding is an elongated but permanent seizure and should be subject to the Fourth Amendment. We submit it is constitutionally unreasonable to seize and forfeit the home of an innocent owner who is not alleged to be involved in the illegal activity when the property was not itself involved in the illegal activity.

In *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 404-405 (1814), this Court construed a forfeiture statute that "expressly declared that the forfeiture shall take place upon the commission of the offense" and therefore determined that the forfeiture related back to the date of the crime and all bona fide purchase rights were abrogated. Although that forfeiture statute clearly did not provide any exception for subsequent innocent owners, Mr. Justice Story dissented and would have refused to apply the relation back doctrine:

> If the principle contended for by the government be admitted in its full extent, it will be found very difficult to bound it. A bale of goods which is once contaminated with a forfeiture will retain its noxious quality through every successive transfer, even until it has assumed under the hands of the artisan its ultimate

> application to domestic use. Yet such a position would strike us all as monstrous.

Id. at 416.

While *Calero-Toledo, supra*, upheld such seizures under the due process clause, the early members of this Court had difficulty with the harshness of the doctrine even when cases were limited to property which was itself guilty.

The government seeks to forfeit the house and home of Beth Ann Goodwin which she has now owned and maintained for almost a decade. There is no claim that the government or the public has been harmed or damaged by Ms. Goodwin's conduct, nor is there any claim that the forfeiture of Ms. Goodwin's home will remedy a specific harm that has been inflicted upon the federal government or the public by her or her children. This penalty has no identifiable remedial aspect; it is a drastic type of quasi-criminal forfeiture. Forfeiture of the homes of innocent partners in a spousal type relationship operates to penalize wives and children for the alleged but unproven crimes of their husbands and fathers. Consistent with this Court's recognition of the sanctity of the home, *e.g.*, *United States v. Karo*, 468 U.S. 705, 714 (1984), and *Payton v. New York*, 445 U.S. 573, 590 (1980), the full protections afforded by the Fourth and Fifth Amendment should apply to all such forfeiture actions.

A. Due Process And The Prohibition Against Unreasonable Seizures Require That The Government Prove That The Property Or The Homeowner Be Significantly Involved In Drug Activity Before A Forfeiture May Proceed.

The deposition of the affiant to the complaint made plain that the government's informant upon whom he

relied had no personal knowledge that the money, transferred to Goodwin in 1982 and later used to buy the home was derived from drug transactions. JA 32-36. Ms. Goodwin filed a summary judgment motion and motion to dismiss on the grounds that the probable cause standards and the "substantial connection" standards required by *United States v. U.S. Coin and Currency*, 401 U.S. 715 (1971), were not satisfied. In that case, this Court stated:

> When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise.

401 U.S. 721-22.

Various circuits have mandated that the government provide evidence of "a substantial connection between the property to be forfeited and the underlying criminal activity" prior to the forfeiture of an innocent owner's property. *See, e.g., United States v. Real Property and Residence at 3097 S.W. 111th Ave., Miami, Florida*, 921 F.2d 1551, 1555-56 (11th Cir. 1991); *United States v. Santoro*, 866 F.2d 1538, 1542 (4th Cir. 1989); *United States v. One 1986 Nissan Maxima GL*, 895 F.2d 1063, 1064 (5th Cir. 1990); *United States v. Padilla*, 888 F.2d 642, 643 (9th Cir. 1989).

In this case, the district court entered a judgment virtually concluding the case without any trial or evidentiary hearings. (Pet. App. 42 n.3) The district court presumed that since the $216,000 wired to claimant's attorney was traceable to an illegal transaction and was later used to fund the balance of the $240,000 purchase price for the home, that fact alone satisfied the substantial connection requirement. (Pet. App. 24, 13-14)

The Third Circuit did not need to address the constitutional issues inasmuch as its construction of the innocent owner provision made it unnecessary. Innocent owners should be protected by 21 U.S.C. 881(a)(6) from forfeitures and evidence of a "substantial connection" to the criminal offenses should be required. Otherwise, the Constitution should require the government to establish far more than that there is probable cause to believe that proceeds allegedly traceable to a drug offense committed by someone other than the owner have tainted the property. The homes of those deemed innocent should not be seized and forfeited, as a matter of law, on so slim an allegation.

B. The Framers Of The Constitution Prohibited The Application Of The Forfeiture Laws To Forfeit The Homes Of Innocent Wives And Children In Other Contexts.

Support for the application of the pertinent constitutional provisions is found in another clause of the Constitution. The forfeiture of a home owned by an innocent spouse and her children, as sought in this case, was beyond the bounds of those punishments deemed acceptable to the framers of our Constitution.

Under English common law, traitors could be required to forfeit all of their property. Thus, the innocent heir of a traitor would be deprived of his inheritance and the lands and estate that customarily descended to him. Such a draconian forfeiture and punishment was explicitly prohibited by our Constitution. Article 3, Section 3,

Clause 2 prohibits the application of such forfeitures to the wife and children of traitors:

> The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

This Constitutional prohibition was addressed specifically to the offense of treason because it was only treason that warranted such a draconian punishment at common law. The drug forfeiture statutes as interpreted by the government in this case impose the same draconian forfeiture explicitly prohibited by the framers of our Constitution. Under the Constitution, only the person who commits treason can be deprived of his home. His wife and children cannot be deprived of their inheritance.

After the Civil War, statutes were enacted forfeiting the land and property of officers of the Confederate Army since they were deemed traitors. Despite the public call for retribution, as demonstrated by such laws, the real property to be forfeited was held not to extend beyond the life estate of the officers who had fought for the Confederacy. Thus, in *Bigelow v. Forrest*, 76 U.S. (9 Wall) 339 (1870), this Court held that

> the Act shall not be construed to work a forfeiture of the real estate of the offender beyond his natural life. It can do this neither directly nor indirectly. The punishment inflicted upon him is not to descend to his children. His heritable blood is not corrupted. It is of course necessary to give such an interpretation to the words of the statute that they should not contravene the declared intent of Congress.

76 U.S. at 352.

In *Wallach v. Van Riswick*, 92 U.S. 202, 210 (1876), the Court construed this same forfeiture statute and explained the intention of the constitutional provision:

> In England attainders of treason worked corruption of blood and perpetual forfeiture of the estate of the person attainted, to the disinherison of his heirs, or of those who would otherwise be his heirs. Thus innocent children were made to suffer because of the offense of their ancestor. When the Federal Constitution was framed this was felt to be a great hardship, and even rank injustice. For this reason, it was ordained that no attainder of treason should work corruption of blood or forfeiture, except during the life of the person attainted. No one ever doubted that it was a provision introduced for the benefit of the children and heirs alone; a declaration that the children should not bear the iniquity of the fathers.

92 U.S. at 210.

The rationale behind Article Three, Section Three of the Constitution should be considered part of the due process which governs all government takings and part of the prohibition of unreasonable searches (and forfeitures). If our Constitution was intended to prohibit the forfeiture of the estates of innocent families of traitors, it should also be deemed to protect the innocent families of drug offenders.

C. Due Process And The Fourth Amendment Require That An Innocent Owner Have The Right To An Evidentiary Hearing In Connection With The Seizure Of Her Home.

The Third Circuit in this case endorsed the Second Circuit's holding in *United States v. Premises and Real*

Property at 4492 South Livonia Road, Livonia, New York, 889 F.2d 1258 (2d Cir. 1989), that the seizure of a home pursuant to 21 U.S.C. 881 without notice and a hearing violates due process. (Pet. App. 5-6.) Similarly, in *Department of Law Enforcement v. Real Property*, 588 So.2d 957 (Fla. 1991), the Supreme Court of Florida held that due process under its state constitution requires that before real property is seized for criminal violations "that the state must provide notice and schedule an adversarial hearing for interested parties on the question of probable cause prior to any initial restraint." *Id.* at 965. But see *United States v. A Single Family Residence and Real Property Located at 900 Rio Vista Boulevard, Ft. Lauderdale, Florida*, 803 F.2d 625, 632 (11th Cir. 1986).

This Court has always provided significantly greater and special protection for a citizen's home than for personal property and has never held that a home may be seized from its owner and occupant, consistent with our Constitution, without prior notice and a hearing.[4] In *Connecticut v. Doehr*, 111 S.Ct. 2105 (1991), this Court held that state laws which permit the seizure and encumbering of a home or real property without prior notice and a hearing violate due process. Based upon this holding, the Court invalidated Connecticut's prejudgment attachment procedures. The *Doehr* decision also recognized that a

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[4] This court has held that due process permits a seizure of personal property without a prior hearing and notice when violations of the criminal laws are alleged. *See United States v. $8,850*, 461 U.S. 555 (1983); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). Personal property is capable of moving and disappearing, however, and therefore involves different considerations than a home.

rapid post-seizure hearing could not cure the constitutional defect arising from the lack of a prior hearing. 111 S. Ct. at 2114-15. If the due process clause requires such protections from the operation of state attachment statutes, the federal government should be similarly obliged to provide at least that much protection before it seizes a home.

In this case, we submit there was no probable cause to believe that the proceeds were traceable to a drug transaction. Brenna reportedly had a boat business operating, in part, in the Caribbean which included the purchase, sale and charter of boats. JA 103; 95; 61-63. That boat business is not mentioned in the Verified Complaint and no evidence was provided to demonstrate probable cause to believe the funds for the house were not traceable to the boat business.

The sole basis for the allegation in the forfeiture Complaint that the funds to purchase the house were traceable to a drug transaction was an informant/witness named Mazocca. JA 103; 89-90. There was no demonstration that Mazocca was reliable and Mazocca, who had repeatedly violated the drug laws, received the benefit of a plea agreement from the government by providing information to further this case. JA 101, 86. Although the government agreed it would and could produce Mazocca for a deposition, and was ordered to do so, the government refused to permit him to be examined. JA 93, 105-07, 25, 26-27. Mazocca filed no affidavit to support the government's case.

While the government would not produce Mazocca, Giacobbe (the DEA agent who interviewed him) acknowledged that (1) Mazocca had no knowledge concerning

whether the money Brenna originally gave Murphy was drug money, JA 108-09; 104, and (2) Mazocca had no knowledge of Brenna's finances or sources of money in 1982. JA 104. Mazocca had apparently heard from some unidentified source that Brenna was involved in marijuana importation at some unknown time prior to the fall of 1982 but Mazocca did not know how much money, *if any*, Brenna received from such a transaction, where in the United States this reported shipment of marijuana was delivered, where it came from, or even who was involved. JA 86-89.

Murphy, the accountant who transferred the $216,000 and maintained investments for 200 or more clients, was produced by the government for a deposition. He was a government witness who had been paid $30,000 by the DEA over time. Murphy attested that he was not aware of any facts that suggested to him that the funds Brenna provided to Goodwin were "traceable to a drug transaction." JA 43-45; 70, 74.

For several years, the government neither indicted Brenna for drug trafficking nor seized the house. Brenna was, however, charged for the criminal misdemeanor of transporting currency to Murphy, without filing the proper currency transaction reports (CTR's) in late 1987. *See United States v. Brenna*, 878 F.2d 117 (3rd Cir. 1989). Brenna and Ms. Goodwin separated in late 1987. JA 32. Brenna was not criminally charged for any alleged drug transactions until May 1990, one full year after Ms. Goodwin's house was seized. Brenna's indictment, filed in 1990 (one year after the seizure) referenced no drug transactions prior to 1985. JA 34-40.

The probable cause in this case essentially amounts to "evidence" that Brenna had money in 1982; that he was allegedly involved in specified marijuana transactions in 1985; therefore all money he possessed in 1982 is probably traceable to similar drug transactions. There is only one witness (Mazocca) who provided a basis for probable cause that the proceeds used to purchase the house were traceable to a drug transaction. Yet the government refused to permit him to be deposed or to file an affidavit. This case proceeded, virtually to conclusion, based on the statement of an agent as to his recollection of the informal, unsworn interview of an unreliable informant who apparently lacked adequate information himself.

Whether or not probable cause was demonstrated, we ask this Court to hold that a seizure and forfeiture proceeding relating to the home of an innocent person must be instituted with notice and with a pre-seizure evidentiary hearing.[5] The action herein has resulted in the pendency of the seizure action for 3-1/2 years during which time Beth Ann Goodwin has been deprived of at least the property interests identified in *Connecticut v. Doehr, supra*. The violation of those constitutional clauses and the resulting prejudice to this innocent owner

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[5] The lack of prior notice and a hearing in this case was compounded by the lack of any meaningful discovery. The government refused to produce the sole witness who allegedly had knowledge of Brenna's criminal activities. (Pet. App. 33-34.) The district court reviewed the defendant's motion to dismiss and for summary judgment based on written submissions and affidavits. The district court's rulings virtually terminated Goodwin's case without any evidentiary proceedings whatsoever.

requires the dismissal of this action with prejudice, wholly apart from the statutory construction which we contend fully protects the respondent's property interests.

THE REGULATORY REMISSION AND MITIGATION PROCEDURE HAS NO BEARING ON THE CONSTITUTIONAL ASPECTS OF THIS CASE.

The government suggests that the constitutional issue has no merit since the Department of Justice (the "Department") or the seizing agency will, on occasion, remit or mitigate the impact of a forfeiture on an innocent person. The regulatory procedure for remission requires a filing with the Department or the seizing agency. At the Department, a member of the Asset Forfeiture Section of the Criminal Division prepares a report and then the Director of the Asset Forfeiture Division ("Director"), based on the report, awards the remission, partial mitigation or denies any remedy at all. 28 C.F.R. 9.3. If the seizing agency first denies the petition, then the Director cannot even accept a remission or mitigation petition. 28 C.F.R. 9.3(h).

Thus, it is the claimant's direct adversary who has the ability and the authority to resolve cases by remitting all or part of the forfeiture. The remission procedure, while formalizing the process for review, differs little from the U. S. Attorney's authority to settle any pending litigation. The Department can always settle its cases based on the merits and consideration of fundamental fairness and justice. The existence of regulations authorizing the Director to exercise some discretion over the forfeiture, thereby requiring the involvement of some

supervising individuals within the institutional adversary to review such matters, while admirable, has little bearing on the constitutional issue. The discretion to resolve cases on the merits as set forth in 28 C.F.R. 9.5 is similarly inherent in every instance where the attorneys attempt to settle a case.[6]

Even if the remission procedure involved a decision by independent personnel, the institutional interest in the success of forfeitures dictates that such administrative procedure should have no significance in the context of the due process claim. *See Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927).

The standards set forth for remission require the officer to assume a valid forfeiture. Then, if certain required facts are provided by the owner, remission may be granted. The required facts are no less stringent than those that the law requires an innocent owner to prove in court. *See* 28 C.F.R. 9.5(b). Furthermore, the remission regulations in 28 C.F.R. 9.5 do not appear to provide relief for an innocent owner when the property was acquired in whole or in part with proceeds allegedly traceable to a drug transaction.[7] Thus, to suggest that remission makes available any remedy at all for this claimant is simply erroneous.

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[6] Respondent's experience with the remission proceeding suggested that the very same individuals at DEA who were responsible for the forfeiture case were in large part responsible for the remission. The regulations explain this by requiring a report from the seizing agency. 28 C.F.R. 9.3(d).

[7] The Justice Department takes the position that such an owner has no "valid ownership". (Br. at 20) Therefore, claimants such as Ms. Goodwin could not satisfy 28 C.F.R. 9.5(b)(1).

Even if Ms. Goodwin satisfied 28 C.F.R. 9.5(b), her petition need not be granted. The determining official could decide, in his sole discretion, that mitigation, but not remission, was appropriate and therefore a monetary penalty may be extracted in return for the release of the seized property. In that regard, 28 C.F.R. 9.5(c) provides:

> . . . Mitigation may also be granted where the minimum standards for remission have been satisfied but the overall circumstances are such that, in the opinion of the determining official, complete relief is not warranted. Mitigation shall take the form of a money penalty imposed upon the petitioner in addition to any other sums chargeable as a condition to remission. This penalty is considered as an item of cost payable by the petitioner, and shall be deposited as an amount realized from forfeiture in accordance with 28 U.S.C. 524(c).

In this case, the petition for remission was denied in a sentence stating that Goodwin had not satisfactorily established that she lacked knowledge that the property was or would be involved in any violation of law. Although she had attested to these facts, the administrative procedure included no hearing of any kind. The Department's decision was presumably based upon the report of the DEA personnel who were involved in instituting the forfeiture action.

The cases suggest that a decision to remit or to mitigate is non-reviewable.[8] *See, e.g., Ivers v. United States*, 581

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[8] Presumably, the government contends that the remission decisions are non-reviewable by the courts.

F.2d 1362, 1371 (9th Cir. 1978); *United States v. One 1973 Buick Riviera Auto.*, 560 F.2d 897 (8th Cir. 1977); *United States v. One 1972 Mercedes-Benz 250*, 545 F.2d 1233, 1236 (9th Cir. 1976); *United States v. One 1961 Cadillac*, 337 F.2d 730 (6th Cir. 1964); *United States v. One 1941 Plymouth Tudor Sedan*, 153 F.2d 19 (10th Cir. 1946); *General Finance Co. of Louisiana v. United States*, 45 F.2d 380 (5th Cir. 1930). Under such circumstances, when it is simply the direct adversary making an unreviewable judgment to resolve a case, in full or in part, based on its own internal reports, provided in part by the personnel that instituted the forfeiture action in the first place, the regulatory procedure should be accorded no legal significance in this Court's consideration of the constitutional issues.

THE INNOCENT OWNER PROVISION OF 881(a)(6) SHOULD BE BROADLY CONSTRUED TO SATISFY THE CONSTITUTIONAL REQUIREMENTS AND TO PROTECT THE INTERESTS OF OWNERS WHOSE OWNERSHIP RIGHTS ARISE AFTER THE ILLEGAL ACT.

The plain language of 21 U.S.C. 881(a)(6) indicates that protection from civil forfeiture is provided to all innocent owners and not merely to innocent owners who are bona fide purchasers for value. When Congress intends to limit protection from criminal forfeiture to bona fide purchasers for value, it has expressed this intention through unequivocal language stating that relief from such forfeitures should only be available to "bona fide purchasers". *See* 18 U.S.C. 963(c) and 12 U.S.C. 853(c). It did not do so herein. As the Third Circuit

properly noted, any decision limiting the protections provided by Section 881 to purchasers, as distinct from other innocent owners, is contrary to the plain statutory language. (Pet. App. 8a-9a.)

The language of Section 881 seems designed to protect the interests of innocent wives and children as well as bona fide purchasers, whether they take from the alleged felon or the felon's transferees. The government proffers no meaningful explanation of the distinctions in the language. According to the government, despite the apparent breadth of the protection provided by Section 881, it is virtually meaningless, and far narrower than the protection offered bona fide purchasers from criminal forfeitures. There is no cited support in the legislative history that suggests Congress intended to limit protection from the civil forfeitures to a smaller class of innocent owners than are protected from criminal forfeitures. A review of the legislative history to Section 881 suggests the opposite.

The legislative history reveals that Congress intended to exempt *all* subsequent innocent owners from forfeiture under 21 U.S.C. 881, not just bona fide purchasers for value. As the Court in *United States v. One Single Family Residence*, 894 F.2d 1511, 1514 (11th Cir. 1990), noted:

> [A]s Congress escalated its offense in the ongoing "war against drugs" by expanding the scope of property subject to civil forfeiture, it coupled with the forfeiture a proviso, taken verbatim from Section 881(a)(6), protecting innocent owners. Explaining the aim of the innocent owner exception, Congress stated:

> [I]t should be pointed out that no property would be forfeited under the Senate amendment to the extent of the interest of any innocent owner of such property. The term "owner" should be broadly interpreted to include any person with a recognizable legal or equitable interest in the property seized. Specifically, the property would not be subject to forfeiture unless the owner of such property knew or consented to the fact that [the property was used for or traceable to illegal drug activities].

Joint Explanation Statement of Titles I & II, 124 Cong. Rec. S 17647, reprinted in 1978 U.S. Code Cong. & Admin. News 9518, 9522.

Senators Culver and Nunn spoke on the floor of the Senate regarding the innocent owner provision. Senator Culver explained that the innocent owner provision was added as a result of "concerns" expressed by members of the Juvenile Delinquency Subcommittee:

> Specifically, it was noted that the original language could have been construed to reach properties traceable to the illegal proceeds but obtained by an innocent party without knowledge of the manner in which the proceeds were obtained. The original language is modified in the proposed amendment in order to protect the individual who obtains ownership of proceeds with no knowledge of the illegal transaction.

Remarks of Senator Culver, 124 Cong. Rec. 23056 (July 27, 1978), *cited in United States v. Parcel of Real Prop. Known as 6109 Grubb Road, Millcreek Tp., Erie County, Pa.*, 886 F.2d

618, 625 (3d Cir. 1989) (emphasis supplied). Senator Nunn stated that the innocent owner provision was added

> to make it clear that a bona fide party who has no knowledge or consent to the property he owns having been derived from an illegal transaction, that party would be able to establish that fact under this amendment and forfeiture would not occur.

Remarks of Senator Nunn, 124 Cong. Rec. 23057 (July 27, 1978), *cited in United States v. Parcel of Real Prop. Known as 6109 Grubb Road, Millcreek Tp., Erie County, Pa.*, 886 F.2d 618, 625 (3d Cir. 1989) (emphasis supplied).

The express purpose behind the forfeiture laws is to provide a financial disincentive to participants in the drug trade. Even assuming that Congress has the power to forfeit the downstream proceeds of a drug transaction now in the hands of an innocent party, why would Congress exercise that power? What purpose does it serve? The enforcement of forfeiture actions against those deemed innocent of criminal activity or complicity therein should be rejected.

The impact of forfeiture proceedings on innocent owners and bona fide purchasers has been the subject of substantial federal jurisprudence. The results have customarily turned on the specific language of the statute and the intent of the congressional framers.

At common law, the right of forfeiture customarily did not attach until the offending person had been convicted. *Waterloo Distilling Corp. v. United States*, 282 U.S. 577, 580 (1930). As Chief Justice Marshall stated in *United*

States v. Grundy and Thornburgh, 7 U.S. (3 Cranch) 337 (1806):

> It has been proved that in all forfeitures accruing at common law, nothing vests in the government until some legal step shall be taken for the assertion of its right, after which, for many purposes, the doctrine of relation carries back the title to the commission of the offense; but the distinction, taken by the counsel for the United States, between forfeitures at common law, and those accruing under a statute, is certainly a sound one. Where a forfeiture is given by a statute, the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately, or on the performance of some particular act, as shall be the will of the legislature. This must depend upon the construction of the statute.

7 U.S. at 350-51.

In rem actions premised on the theory that the inanimate object has committed the offense have been handled somewhat differently. As Justice Story stated in *The Palmyra*, 25 U.S. (12 Wheat) 1, 14-15 (1827), at common law the forfeiture of a felon's goods was a consequence of the conviction. With respect to a forfeiture *in rem*, where the goods are the offending party, no personal conviction of the owner is necessary. In *in rem* actions against goods which participated in the offense, the language of the statute determines whether the forfeiture takes place upon the commission of the offense or when the property is subjected to the forfeiture action. The statutory language is the guide. *See United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 404-05 (1814); *United States v. One*

Hundred Barrells Distilled Spirits, 81 U.S. (14 Wall) 44 (1872) (the language was the goods "shall be forfeited"); *United States v. Stowell*, 133 U.S. 1 (1890) ("whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited," the relation back doctrine applies).

In this case, Section 881 provides that property shall be *subject to* forfeiture if it is proceeds traceable to money furnished in connection with a drug exchange. The language is not mandatory. At most, the United States has a right to assert a claim against the items of value that were exchanged for drugs *or* the proceeds therefrom in the drug dealer's possession, but not both. The filing of an action is necessary. The statute herein, insofar as it gives the United States various options to pursue (the item exchanged for drugs *or* the proceeds thereof) requires an election to be made. This statute is similar to that analyzed by the Court in *Caldwell v. United States*, 49 U.S. (8 How) 366 (1850).

The relation back doctrine was not codified and therefore did not apply to Section 881 until 1984 when the Congress amended added subsection 881(h). By then, title had already vested and was perfected in Ms. Goodwin, and the *ex post facto* revision of the statute cannot affect her rights.

Section 881 is a tool to fight crime. The criminal forfeitures and the quasi-criminal forfeitures are designed to take contraband, the tools of the drug trade, and the profits and proceeds in the hands of drug dealers. The protection offered to innocent owners in the context of an *in personam* criminal prosecution is limited to bona fide

purchasers. 21 U.S.C. 853. The protection offered to innocent owners in the context of forfeiture actions denominated as civil is logically broader. There is no rigid requirement that the innocent owner be a bona fide purchaser for value in the context of civil forfeitures; nor should there be. Congress knew how to designate such protection when it intended to. *See, e.g.*, 21 U.S.C. 853. These civil forfeiture actions often impact on others who are simply not felons and drug dealers (*i.e.*, innocent wives and children). Criminal forfeitures carry with them the constitutional safeguards of any other criminal action including proof beyond a reaonsable doubt. Since the burden of proof on the government is much lower in civil forfeitures (*i.e.*, probable cause rather than beyond a reasonable doubt), the protection offered by Congress was intended to be similarly broader.

The government recognizes that the criminal forfeiture statute protects bona fide purchasers for value. Ironically, the government suggests that the civil forfeiture statute is less flexible and less protective of the innnocent. The government's argument thus creates an anamolous result: when the prosecution proves beyond a reasonable doubt that the property is substantially related to the criminal transaction, bona fide purchasers will be protected, but when the prosecution can only establish probable cause and declines to bring a criminal forfeiture action, bona fide purchasers are not protected. We submit that is illogical.

Forfeiture statutes containing protections for innocent owners and/or bona fide purchasers have customarily been construed to include protection for those who acquired an interest in the property after the alleged

illegal event.[9] The government cites this Court to two cases where an innocent owner or bona fide purchaser exception to a forfeiture statute has been construed to provide protection only to those with an ownership interest acquired prior to the illegal act. Br. at 22. We submit that the doctrine of those cases should not be adopted by this Court.

We ask this Court to adopt the holding of the Third Circuit and the view of Judge Murnaghan who wrote in *In re One 1985 Nissan 300ZX*, 889 F.2d 1317, 1322 (4th Cir. 1989), in words pertinent here:

> I reject the view that 21 U.S.C. Sec. 881(h) forbids anyone from qualifying as an innocent owner if he or she acquired the money or property after the illegal transaction. Such an interpretation would seem impossible to square with the plain language of Sec. 881(a)(6) which expressly encompasses "proceeds traceable to . . . an exchange" of controlled substances. How can one obtain drug deal proceeds before the transaction even takes place? I see no way to reconcile the language of Sec. 881(a)(6) with the majority's implicit interpretation of Sec. 881(h).

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[9] *See United States v. One Urban Lot Located at 1 St. A-1, Valparaiso, Bayamon, Puerto Rico*, 865 F.2d 427 (1st Cir. 1989); *In re Metmor Financial, Inc.*, 819 F.2d 446, 448 n.2 (4th Cir. 1987); *United States v. One Single Family Residence Located at 6960 Miraflores Ave.*, 731 F. Supp. 1563, 1568 (S.D. Fla. 1990), *appeal dismissed*, 932 F.2d 1433 (11th Cir. 1991), *cert. granted on other issues sub nom; Republic Nat'l Bank v. United States*, 112 S.Ct. 1159 (11th Cir. 1992); *United States v. One Single Family Residence*, 683 F. Supp. 783, 787-788 (S.D. Fla. 1988); *see also Nissan*, 889 F.2d at 1322 (Murnaghan, J., concurring).

The government seeks to explain away the indisputable persuasiveness of that position by designing a hypothetical of an innocent investor whose funds are spent for drugs by his trustee. This creative example provides the government with the ability to argue that under their construction, the innocent owner provision is not necessarily meaningless. Nevertheless, the government's interpretation of the harm to be protected by the innocent owner provision finds no support in the legislative history or the case law. In no case known to counsel has this Court construed an innocent owner provision of any other forfeiture statute to protect only those persons who acquired their interest prior to the illegal act. The case law, by and large, deals with innocent owners and bona fide purchasers whose ownership arises after the illegal act. No case cited by the government involves the hypothetical example proffered by the government, and a construction of the innocent owner provision that is virtually meaningless should not be adopted either.

The government assumes that the innocent owner provision looks to the owner's state of mind *"at the time the [illegal] acts were committed."* (Br. at 23; emphasis in original) The government then argues that if its construction of 881 is rejected, a transferee who learns of the criminal transaction *after* the criminal transaction, but before the transfer, could avoid forfeiture. (Br. at 24)

This argument is based on the false premise that the innocent owner defense looks to the transferee's state of mind at the time the criminal transaction took place. The language of the statute does not dictate that result. The statute should be read to require that the owner assert his lack of knowledge of the criminal transaction at the time

of the transfer. Since Goodwin did not have any knowledge of the alleged criminal transaction until long after the transfer, she should be protected by the innocent owner clause.

The government criticizes the Third Circuit's opinion, stating that "under the Third Circuit's construction, however, property . . . can be pulled outside the statute retroactively by a transfer to an innocent third party." (Br. at 30) But the government's construction of the innocent owner defense has the same effect. Even if the innocent owner clause is limited, as the government argues, to situations where the owner held title prior to the criminal transaction, we would still be faced with the scenario where the government, having been vested with title by virtue of 881(h), would retroactively lose its title based upon the subsequent assertion of such an innocent owner's right to title.

Under other aspects of the law of real property, rights in real property can be retroactively changed. For example, a lienholder's failure to properly record or give notice can retroactively strip that lienholder of his senior status upon the subsequent recordation of what would otherwise have been a junior lien. *See generally* government's brief at n.9.

Section 881(h) should not be construed as a substantive limitation on the innocent owner defense because to do so would nullify that defense completely.

THE GOVERNMENT'S CONTENTION THAT GOODWIN IS A DONEE RATHER THAN A BONA FIDE PURCHASER SHOULD HAVE NO LEGAL CONSEQUENCE.

The government has labeled Beth Ann Goodwin as a "donee" and argues that her ownership rights as a donee are entitled to less protection than the identical ownership rights of a bona fide purchaser. Br. at 36, n.13. The government's argument suffers from two flaws: first, it has no basis in the statutory language. Second, Goodwin is not just a donee.

The government does not point to any statutory language to support the distinction between donees and purchasers.[10] Rather, the government fears that if donees were protected by the innocent owner defense, "[d]rug traffickers could shelter their assets by giving them to friends and relatives while still retaining some degree of enjoyment and control." Brief at p. 36, n. 13. Such a policy-oriented argument has a hollow ring where, as here, the proported donor *has not* retained control over the property. (Goodwin barred Mr. Brenna from the premises nearly five years ago.)

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[10] Indeed, the statutory language of the various forfeiture statutes indicates that no such distinction exists. In the criminal forfeiture statute, 21 U.S.C. 853, Congress provided certain remedies specifically for bona fide purchasers. The civil forfeiture statute, 21 U.S.C. 881, by comparison, makes no such distinction, creating one broad remedial scheme for all innocent owners, regardless of their status as purchasers or donees.

Furthermore, the government's scenario is largely illusory. If a drug trafficker wanted to shelter assets, but still retain control over them, it is unlikely that he would make an outright gift to a third party. It is far more likely that he would create a symbiotic arrangement such as a joint tenancy. And despite the government's concerns for the circumvention of the forfeiture statute, the courts have preserved the innocent owner defense of the recipient of such joint tenancies. *See, e.g., United States v. Parcel of Real Property Known as 1500 Lincoln Avenue*, 949 F.2d 73 (3rd Cir. 1991); *United States v. Certain Real Property Located at 2525 Leroy Lane*, 910 F.2d 343 (6th Cir. 1990).

Even if there were a statutory distinction between donees and purchasers, the government is incorrect in denominating Goodwin as a donee. Concededly, she is not a bona fide purchaser in the classical sense. That is, she did not receive the funds pursuant to a written contract in exchange for a pre-determined market-value consideration. But Goodwin was more than just the fortuitous beneficiary of Brenna's largess. Rather, she provided Brenna with the full panoply of marital privileges. She was Brenna's "cohabitant" and, under New Jersey law, she was entitled to certain property rights. *Kozlowski v. Kozlowski*, 164 N.J. Super. 162 (Ch. Div. 1978), *aff'd*, 80 N.J. 378 (1979); *Crowe v. DeGioia*, 90 N.J. 126 (1982), *on remand*, 203 N.J. Super. 22 (App. Div. 1985).

In *Kozlowski*, the parties lived together for nearly 15 years. After defendant left the relationship, the plaintiff brought an action to recover her share of the assets which the defendant had accumulated during the relationship, plus the reasonable value of services rendered for his benefit. The trial court stated:

> The dilemma may be simply stated: Is there any remedy available under our law for a woman who has devoted 15 or more years living with a man, for whom she provided the necessary household services and emotional support to permit him to successfully pursue his business career and for whom she has performed housekeeping, cleaning and shopping services, run the household, raised the children, her own as well as his, all without benefit of marriage; a woman who was literally forced out of the household with no ongoing support or wherewithal for her survival?

164 N.J. Super. at 170. The court enforced plaintiff's claim, concluding:

> This court could not contenance the unconscionable result which would obtain should all relief be denied this plaintiff who was . . . without means of support or assets, and with little hope of developing support opportunities.

164 N.J. Super. at 178.

In *Crowe v. DeGioia*, the parties had lived together in a relationship akin to marriage for over 20 years. Relying on equitable principles, the trial court granted plaintiff *pendente lite* support payments. In affirming that decision, the Supreme Court of New Jersey stated: "[T]he inability to fit plaintiff's claim for temporary relief into the conventional category of a matrimonial action is not a bar to relief. To achieve substantial justice in other cases, we have adjusted the rights and duties of parties in light of the realities of their relationship." 90 N.J. at 135. To that end, New Jersey courts will base recovery on *quantum meruit* or employ equitable remedies such as constructive

or resulting trusts. 203 N.J. Super. at 36. Thus, in affirming the trial court's decision to award Ms. Crowe *pendente lite* support payments, the Supreme Court of New Jersey stated:

> Increasing numbers of unmarried couples live together . . . Although plaintiff need not be rewarded for cohabitating with defendant, she should not be penalized simply because she lived with him in consideration of a promise for support. Our endeavor is to shape a remedy that will protect the legally cognizable interests of the parties and serve the needs of justice.

90 N.J. at 135.[11]

In this case, Goodwin and Brenna cohabited for seven years. She cooked, cleaned and kept house for him. They lived together in all respects as husband and wife. Under the circumstances, had Brenna not given Goodwin the money to purchase the house, she would have been

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[11] New Jersey has long recognized the special interest a mother and her children have in the retention of their home. In *Wheeler and Green v. Kirtland*, 23 N.J. Eq. 13 (N.J. Ch. 1872), *modified*, 24 N.J. Eq. 552 (N.J. Ch. 1873), creditors of the husband's business sought to place a lien on the home owned by the wife. The husband had gifted the money to his wife which she used to purchase their family home. The wife was unaware that her husband was insolvent. The court opined that if a donee in a marital relationship receives money in good faith, there are no grounds to create a trust for creditors while the property is kept in good faith. *Id.* at 18-19. Although her husband gave her a large part of the purchase money which she used to pay for the home, the court found no authority for the creation of a resulting trust from such facts. *Id.* at 22.

entitled to similar amounts.[12] The Solicitor's office has chosen to petition the Court in this case perhaps, in part, because Ms. Goodwin is not formally married and can thus be deemed a less sympathetic recipient of a home. But whatever decision is reached in this case will impact equally on innocent wives and children brought up in the context of formal wedding vows.

THE GOVERNMENT'S POSITION THAT THE PROTECTION AFFORDED BY CONGRESS TO INNOCENT OWNERS IS INAPPLICABLE TO PROTECT BONA FIDE PURCHASERS, INNOCENT WIVES AND CHILDREN FROM THE FORFEITURE OF THEIR HOMES WARRANTS REJECTION IN THE STRONGEST TERMS.

The government expresses concern that any construction of innocent owners that includes the wives and children of those allegedly involved in drugs would permit felons to enjoy the benefits of the drug trade. To ensure that this does not happen, the government asks this Court to sacrifice the interests of both innocents and bona fide purchasers.

A civil forfeiture begins with a showing of *only* probable cause. In this case, that amounted to very little. The district court and the appellate court grounded their findings that probable cause existed on an indictment returned a full year after the seizure, which indictment

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[12] At the least, to the extent of the value of the improvements, taxes, cost of maintenance and other payments she may have made on behalf of the property, she stands in a different position than a mere donee.

referenced no drug transactions prior to 1985, three years after the home purchase herein. Thereafter, the burden was placed on the innocent owner to prove a negative, *i.e.*, that the proceeds provided by someone else were not traceable to a drug transaction. When a seizure occurs seven years after the purchase and eight or more years after the alleged undated and nebulously identified illegal transaction, which transaction involved only others, that burden is impossible. Even the families of alleged drug dealers are entitled to be treated with fundamental fairness. We submit that a narrow reading of the innocent owner provision of the drug forfeiture laws will produce fundamentally unfair results in this case and others.

Most citizens, including Ms. Goodwin, do not have the financial ability to litigate against the United States. When a car or a boat or even a home is seized, the value of the citizen's equity may well be inadequate to finance the exhaustive efforts needed to retreive the property. The seizure itself will often end the case. Moreover, the government's seizure of a car or boat or even a home (particularly if left unoccupied) will, in short order, result in substantial depreciation of the asset. Even if the seized asset is later returned to the innocent owner, substantial damage is done by virtue of the government's seizure.

The zeal with which the government pursues its asset forfeiture program is substantiated by this seizure, seven years after the purchase, and the conceded use of Ms. Goodwin's own immunized testimony to draft the forfeiture Complaint. Many U.S. Attorney's offices in the United States, including the U.S. Attorney's office in New Jersey, have asset forfeiture divisions whose sole purpose is to maximize the financial recovery to the government.

Unless the government makes efforts not to include innocent owners in their seizure nets, irreparable damage to innocent citizens is inevitable. We ask this Court to preserve Congress' intent in passing Section 881 – to give the interests of all innocent citizens more weight than the interests of the government in maximizing its financial return from its asset forfeiture program.

CONCLUSION

For the foregoing reasons, the judgment of the Court below should be affirmed and/or the application of this action to this respondent should be held to be in violation of the Constitution.

Respectfully submitted,

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